United Nations A/72/335

General Assembly

Distr.: General
15 August 2017

Original: English

Seventy-second session
Item 73 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Unlawful death of refugees and migrants

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Agnes Callamard, submitted in accordance with Assembly resolution 71/198.

* A/72/150.

17-14011 (E) 110917

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Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions

Summary

The present report focuses on the mass casualties of refugees and migrants in the course of their flight. It addresses killings by both State and non-State actors, and denounces a quasi-generalized regime of impunity, worsened by an absence of accurate data on the dead and missing. The Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary killings calls urgently on States to address this human rights crisis by prioritizing the protection of the right to life in their migration and refugee policies.

The report presents evidence that suggests multiple failures on the part of States to respect and protect refugees' and migrants' right to life, such as unlawful killings, including through the excessive use of force and as a result of deterrence policies and practices which increase the risk of death. Other violations to the right to life result from policies of extraterritoriality amounting to aiding and assisting in the arbitrary deprivation of life, and from the failure to prevent preventable and foreseeable deaths, as well as the limited number of investigations into these unlawful deaths. The report also presents best practices in search and rescue operations and for the dignified treatment of the dead, but points out that States do not implement them as they should, and fail to resource them adequately.

The scale of casualties among refugees and migrants demands urgent attention at national, regional and international levels. The report presents recommendations for this purpose. The equal protection of all lives, regardless of migration status, is a central underpinning of the entire international human rights system: it must be upheld in the context of the movement of people and must form the foundation of all governmental and intergovernmental policies.

17-14011

Contents

		Page
I.	Introduction	4
II.	Overview	4
III.	Arbitrary deprivation of life in the context of mixed migration	6
	A. Universal obligation to protect life without discrimination	6
	B. Unlawful killings by security officials, including border guards	7
	C. Excessive use of force	8
	D. States aiding and assisting extraterritorial killings and deprivation of life	10
	E. Killings by non-State actors, including smugglers and traffickers	12
	F. Investigations of arbitrary deprivations of life	14
IV.	Search, identify, and trace	16
	A. Obligation to protect: search and rescue operations	16
	B. Dignity in death	18
V.	Conclusion	21
VI.	Recommendations	22
	A. Integration of protection of the right to life in international initiatives	22
	B. International cooperation for dignified treatment of the dead: 2018	22
	C. Transnational justice cooperation	22
	D. International accountability	23
	E. General principles	23
	F. Investigation	23
	G. Access to justice and remedies	24
	H. Monitoring	24
	I. Search and rescue	24
	J. Right to truth and collective memory	25
	K. Identification, tracing and burial of the dead	25

I. Introduction

1. The present report is concerned with what can only be described as a human rights and humanitarian crisis. This crisis is characterized by mass casualties globally, a regime of impunity for its perpetrators and an overall tolerance for its fatalities. The report is also concerned with an international crime whose very banality in the eyes of so many makes its tragedy particularly grave and disturbing.[1]

2. Its victims are refugees and migrants. Data on their arbitrary deprivation of life are still lacking or vastly inaccurate, making for a macabre balance sheet that tells us too little too late. The data do not tell us of the manner of these deaths: how many people have been executed, shot, drowned; how many have lost their lives to starvation or dehydration; how many have been tortured, denied life-saving treatment, or have died from despair. The figures tell us little about the perpetrators of violations against people forced to leave their homes and countries, be they security officials, armed groups or smugglers. The data do not reveal how State policies may be responsible for violence and abuse (A/65/222, para. 15).

3. It would seem that the universal right to life is limited by nationality, bounded by borders and visas and, ultimately, determined by the randomness of one's birthplace. Yet every human being, including those without formal authorization to cross a border, is entitled to the right to life — the most fundamental human right and the basis for all other rights — and entitled to protection.

4. There is a global understanding that this is a humanitarian crisis that must be tackled. In the 2016 New York Declaration for Refugees and Migrants (resolution 71/1), world leaders committed themselves to protecting the human rights of all refugees and migrants, regardless of status, and to saving lives. The Declaration has set in motion the development of two global compacts, the global compact on refugees, and the global compact for safe, orderly and regular migration, both of which are to be adopted in 2018.

5. The purpose of this report is to contribute to these efforts by: focusing on violations of the right to the life of refugees and migrants while on their journeys; addressing the role of States in terms of respecting, protecting and preventing the arbitrary deprivation of life at the hands of State and non-State actors; and highlighting measures to ensure that the equal protection of all lives, which is central to the international human rights system, form the foundation of all migration and refugee policies.[2]

II. Overview

6. Around the world today, more than 22.5 million people are refugees; the largest number since the Second World War.[3] The number of migrants worldwide — that is, people residing outside their country of birth — is the highest ever recorded, having reached 244 million (from 232 million in 2013). People have been forced from their homes by war, civil unrest, violence, persecution, famine, poverty,

[1] Ioannis Kalpouzos and Itamar Mann, "Banal crimes against humanity: the case of asylum seekers in Greece", *Melbourne Journal of International Law*, vol. 16, No.1 (2015).

[2] In preparing this report, the Special Rapporteur conducted thematic visits to Italy and to European Union institutions (10-19 May 2017), convened an expert meeting and conducted interviews with experts from a range of countries. She wishes to extend her gratitude to the Government of Italy and to the European Union institutions for their cooperation during her visits, as well as to the experts that assisted her research.

[3] Office of the United Nations High Commissioner for Refugees (UNHCR), Figures at a glance (Statistical yearbooks database), available from www.unhcr.org/figures-at-a-glance.html.

environmental degradation, discrimination and denial of access to basic services, and they leave in search of opportunities. A number have done so through legal pathways or third-country resettlement.[4] Many have left their countries of origin irregularly. On their journeys, they may face rampant crime, detention under inhuman conditions, sexual violence, slavery, kidnapping and even murder.

7. Migration and flight routes stretch from West Africa through Niger to Libya; from the Horn of Africa through the Sudan into Libya; from Central America through Mexico and into the United States of America and now, increasingly, into Canada; from Bangladesh into Libya and Italy; and from the Islamic Republic of Iran through Indonesia towards Australia. Other migration routes include the flight of Syrians into Turkey and the Rohingya from Myanmar into Bangladesh and other countries.[5] Established routes shift, particularly as destination nations, transit States and nations of origin erect ever more stringent barriers along them.

8. Thousands of refugees and migrants die or are killed every year. The International Organization for Migration admits that determining how many die or are killed is "a great challenge", that, at a minimum, 46,000 migrants have lost their lives or have gone missing worldwide since 2000[6] and that the: "true number of migrant deaths around the world is surely greater, however. Countless bodies are never found, countless missing persons are never reported; fatal journeys lost from all record".[7] Reporting mechanisms on the African routes are lacking,[8] and the number of deaths on the Central American routes is largely undetermined. We also have very little idea of how many have perished in the Gulf of Aden, the Bay of Bengal or the Andaman Sea.[9] Furthermore, gender-disaggregated data on such deaths is largely unavailable.[10]

9. Smugglers and traffickers are an integral component of this movement; without them, refugees and migrants are generally unable to navigate the barriers many States erect to deter entry.[11] Some smugglers are linked to transnational criminal networks while many are not.[12] With the multiplication of predatory actors, the risks are increasing. There are reports of abductions; people being detained or

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[4] Burden-sharing for the global refugee population resides disproportionally with developing countries, who host an increasingly higher percentage of the global refugee population: 86 per cent, compared with about 70 per cent two decades ago; see UNHCR, "Global trends in forced displacement in 2015" (Geneva, 2016).

[5] International Organization for Migration (IOM), World migration (global migration flows database); see also Peter Tinti and Tuesday Reitano, *Migrant, Refugee, Smuggler, Saviour* (London, C. Hurst and Co., 2016).

[6] IOM, Behind the Numbers, 17 December 2013.

[7] Tara Brian and Frank Laczko, *Fatal Journeys: Identification and Tracing of Dead and Missing Migrants*, vol. 2 (IOM, Geneva, 2016).

[8] Colin Sollitt, "Forgotten fatalities: the number of migrant deaths before reaching the Mediterranean", 27 June 2016; Hassène Kassar and Paul Dourgnon, "The big crossing: illegal boat migrants in the Mediterranean", *European Journal of Public Health*, vol. 24, No. 1 (August 2014).

[9] According to the Arakan Project, between June 2012 and May 2014, as many as 2,000 Rohingya are believed to have gone missing at sea; see Equal Rights Trust and Institute of Human Rights and Peace Studies, Mahidol University, *Equal Only in Name: The Human Rights of Stateless Rohingya in Malaysia* (London, 2014).

[10] Anecdotal evidence tends to show that women may be at greater risk of unlawful death.

[11] Tinti and Reitano, *Migrant, Refugee, Smuggler, Saviour*; United States of America, Department of Homeland Security, Office of Immigration Statistics, "An analysis of migrant smuggling costs along the southwest border" (Working Paper, November 2010).

[12] See, for example, Mark Micallef, "The human conveyor belt: trends in human trafficking and smuggling in post-revolution Libya" (Geneva, Global Initiative against Transnational Organized Crime, 2017).

kidnapped for ransom; forced labour; torture, including rape; and people being thrown off boats or left behind in deserts.

10. In a global environment where refugees and migrants are demonized, and their movements criminalized (A/HRC/23/46, para. 35), countries around the world have designed policies based on deterrence, militarization and extraterritoriality which implicitly or explicitly may tolerate the risk of migrant deaths as part of an effective control of entry. Deterrence policies are punitive, including policies ranging from securing the more accessible border entry points — thereby purposefully funnelling the migration flows into more hazardous terrain — to the imposition of strict detention and return policies.

11. Externalization involves a policy under which "border control no longer takes place at the physical borders" (A/HRC/23/46, para. 55). The goal is to ensure that people never reach destination States, thereby blocking their claims for asylum and other protections. The most visible version is the pushback both on the high seas and on land, a tactic that greatly endangers lives. Other tactics include funding migration control in third countries to ensure that refugees or migrants remain in their countries of origin, first asylum or transit.

12. Militarization and securitization of border control is a third common feature, including through the deployment of military equipment, drones and satellite surveillance to monitor migration routes.[13] The militarization of border control leaves civilians "vulnerable to a wide range of abuses" owing to the mind-sets of some who may perceive themselves as being akin to the military (A/HRC/26/36, para. 21).

13. Although often justified on grounds that they disrupt the business model of smuggling, most experts agree that these policies make migrants more dependent on smugglers, putting their lives at even greater risk.[14] The intensification of border controls traps both States and migrants in "a vicious circle in which increasing numbers of border deaths lead to calls to 'combat' smuggling and increase border patrolling, which forces refugees and other migrants to use more dangerous routes using smugglers' services".[15]

III. Arbitrary deprivation of life in the context of mixed migration

A. Universal obligation to protect life without discrimination

14. The right not to be arbitrarily deprived of life is a foundational and universally recognized right, applicable at all times and in all circumstances, including during armed conflict or other public emergency. The right to life — a norm of *jus cogens* — is protected by international and regional treaties, customary international law and domestic legal systems.

15. Article 6 (1) of the International Covenant on Civil and Political Rights provides that "[e]very human being has the inherent right to life" and that no one "shall be arbitrarily deprived of his life." Article 26 entitles everyone to protection of this right "without any discrimination".

[13] "The European Union awards record drone contract", *The Maritime Executive*, 20 March 2017.

[14] See, for example, European Commission, "Fourth progress report on the partnership framework with third countries under the European agenda on migration", 13 June 2017.

[15] Hein de Haas, "Borders beyond control?", 7 January 2015.

16. Substantively, international law requires State agents to take "all reasonable precautionary steps to protect life and prevent excessive violence" (A/HRC/32/39, para. 75) by States, their agents and by non-State actors: States must protect and fulfil the right to life, including by exercising due diligence to prevent arbitrary deprivations of life by private actors.

17. Individuals are entitled not to be arbitrarily deprived of life on grounds "impermissible under international law, or under more protective domestic law provisions" (A/HRC/35/23, para. 29) while ""deliberate intent' on the part of the State is not required for a killing or a deprivation of life to be deemed 'arbitrary'" (ibid., para. 34).

18. Procedurally, whether committed by the State or by private actors, States must investigate all deaths thoroughly, independently and effectively, provide redress or reparations and ensure that no person acts with impunity. Failure to investigate is in and of itself a violation of the right to life.[16]

19. The right to life is further protected by the 1951 Convention Relating to the Status of Refugees and 1967 Protocol to the Convention, which impose on States the core principle of non-refoulement, now a rule of customary law: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

20. Prohibition of return to a place where individuals are at risk of torture and other ill-treatment is also enshrined in article 3 of the Convention against Torture. This absolute prohibition means that the fundamental right to be free from torture or other ill-treatment is respected even in cases where non-refoulement under refugee law may be circumscribed. Under international jurisprudence, States have an obligation "not to put a person in a position where he will or may suffer" such human rights violations at the hands of another State or non-State actors within that State.[17]

21. Both substantively and procedurally, the right to life of many refugees and migrants may be violated.

B. Unlawful killings by security officials, including border guards

22. A range of actors[18] have reported that State agents may be responsible, directly or in collusion with armed groups or criminal networks, for human rights violations against migrants, including violations of the right to life.

[16] See, e.g., European Court of Human Rights, Grand Chamber, *McCann and Others v. The United Kingdom*, application No. 18984/91, Judgment of 27 September 1995, para. 161; Inter-American Court of Human Rights, *Montero-Aranguren and Others (Detention Centre of Catia) v. Venezuela*, Judgment of 5 July 2006, para. 66; African Commission on Human and Peoples' Rights, general comment No. 3 on the right to life (article 4), November 2015, paras. 2 and 15; Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, paras. 15 and 18.

[17] See European Court of Human Rights, Plenary, *Soering v. The United Kingdom*, application No. 14038/88, Judgment of 7 July 1989, para. 82; European Court of Human Rights, Grand Chamber, *Hirsi Jamaa and Others v. Italy*, application. No. 27765/09, Judgment of 23 February 2012, para. 131 (Italy "knew or should have known" migrants would receive no protection in Libya); United Nations Committee against Torture, *J.H.A. v. Spain*, communication No. 323/2007, decision of 10 November 2008 (jurisdiction with State exercising control over person).

[18] United Nations agencies, regional investigatory bodies and non-governmental organizations.

23. In Libya, for example, the United Nations Support Mission in Libya (UNSMIL) reports widespread, gross human rights violations against migrants by armed groups, smugglers and traffickers, private employers, police, the Libyan Coast Guard and the Department for Combatting Illegal Migration. UNSMIL has reported that interceptions of migrant boats by Libyan coast guards have involved actions that may constitute arbitrary killings.[19] The International Criminal Court is considering "carefully examining the feasibility of opening an investigation into migrant-related crimes in Libya".[20]

24. In Mexico, the Inter-American Commission on Human Rights found the "extreme vulnerability" of migrants to be "one of the worse human tragedies in the region". The Commission also received reports of "multiple cases in which migrants are [...] murdered, disappeared" and that "in a considerable number of cases, State agents — members of the various police forces or personnel of the National Institute of Migration — have been directly involved in the commission" of these crimes and human rights violations.[21] Allegations of similar violations by the State, including unlawful killings, have been made against States along the world's migration routes, including in Central America, Egypt and the Sudan.[22]

C. Excessive use of force

25. Most frequently, arbitrary killings in the course of restricting migration arise as a result of excessive use of force by border control agents and other officials involved in migration control. Attempts by migrants to evade immigration control should be met with a response that is both necessary and proportionate.

26. International standards on the use of force in law enforcement, including immigration control, are well developed. A written "domestic legal framework" for the use of force must be in place (A/HRC/26/36, para. 47). Guidelines must mandate that lethal force is only legitimate "to save the life of a person or to protect a person from serious injury" (ibid., para. 58), that such force must be necessary and proportionate and that it cannot be used in a discriminatory fashion (ibid, paras. 59-74).

27. In particular, "Firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender" (A/61/311, para. 38).The use of force should be gradual, starting at a low level and escalating only where necessary, as determined by the resistance offered by suspects (ibid., para. 41).

28. The basic tenant is that "lethal force may not be used intentionally merely to protect law and order or to serve other similar interests [...] In practice, this means that only the protection of life can meet the proportionality requirement where lethal force is used intentionally, and the protection of life can be the only legitimate

[19] United Nations Support Mission in Libya (UNMSIL) and Office of the United Nations High Commissioner for Human Rights (OHCHR), "Detained and dehumanized", 13 December 2016; see also S/2017/466 (final report of the Panel of Experts on Libya established pursuant to resolution 1973).

[20] International Criminal Court, "Statement of the ICC Prosecutor to the United Nations Security Council on the situation in Libya", 9 May 2017.

[21] Inter-American Commission on Human Rights, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, OEA/Ser.L/V/II., Doc. 48/13 (2013) para. 5.

[22] Laurie Lijnders and Sara Robinson, "From the Horn of Africa to the Middle East: human trafficking of Eritrean asylum seekers across borders", *Anti-trafficking Review*, No. 2 (2013); Medecins Sans Frontieres, "Forced to flee Central America's northern triangle: a neglected humanitarian crisis", May 2017; Human Rights Watch, "'I wanted to lie down and die': trafficking and torture of Eritreans in Sudan and Egypt", 11 February 2014.

objective for the use of such force. A fleeing thief who poses no immediate danger may not be killed, even if it means that the thief will escape" (A/HRC/26/36, para. 72).

29. Similarly, irregularly crossing a border, hiding from border guards, throwing stones or escaping capture or interception are not acts that ought to be met with deadly force.

30. Casualties as a result of excessive use of force by border guards, including use of lethal force, have been alleged in Egypt, Spain, Turkey, Yemen and other countries. For instance, between 2007 and 2010, Egyptian border guards allegedly shot and killed people attempting to leave Egypt and flee into Israel, and military forces reportedly shot at a boat attempting to leave Yemen, leading to the deaths of dozens of people.[23]

31. At the borders of the United States, 50 deaths resulting from the use of lethal force by Customs and Border Protection agents have allegedly occurred since 2010, nine of which were in response to rock throwing. This does not include instances of the use of force not resulting in death.[24] In 2014, Customs and Border Protection revised its use of force guidelines to mandate proportionate force, including in response to rock throwing. Possibly as a result, from 2012 to 2016, the use of firearms by border patrols has more than halved (from 59 to 27 incidents).[25] Nevertheless, gaps remain: investigations into deaths during apprehensions or while in custody remain largely shrouded in secrecy without sufficient participation by civil society and impartial experts. To date, it appears that one officer has been criminally prosecuted in federal court[26] and two officers have been charged in State court.[27]

32. The use of non-lethal force by border control agents may also result in arbitrary deprivation of life. For instance, 15 migrants drowned off a Spanish enclave in North Africa on 6 February 2014 after agents of the Spanish Guardia Civil fired rubber bullets at and used teargas on migrants attempting to swim to Ceuta from Morocco. In January 2017, under pressure from the families of the victims, a higher court in Ceuta decided to reopen the investigation into the deaths, which was closed in 2015.[28]

33. "Push-back" measures, in addition to violating the principle of "non-refoulement," may also amount to excessive use of force whenever officials place refugees or migrants intentionally and knowingly in circumstances where they may be killed or their lives endangered because of the environment. This may include, for instance, "push-back" of Rohingyas and Bangladeshis on the high seas

[23] See for example: UNHCR,"UNHCR condemns refugee deaths off Yemen, calls for inquiry", press release, 20 March 2017; Human Rights Watch, "Turkey: border guards kill and injure asylum seekers," 10 May 2016; UNMSIL and OHCHR, "Detained and dehumanized"; Gramer, R., "Apache Helicopter Guns Down Boat Full of Somali Refugees Fleeing Yemen", *Foreign Policy* (The Cable), 17 March 2017.

[24] American Civil Liberties Union, "Fatal encounters with CBP", fact sheet, 26 April 2017.

[25] United States of America, Department of Homeland Security, "CBP border security report" (https://www.cbp.gov/sites/default/files/assets/documents/2016-Dec/CBP-fy2016-border-security-report.pdf.).

[26] See brief of amici curiae submitted by former officials of the United States. Customs and Border Protection Agency in support of petitioners in the case of *Jesus C. Hernandez and Others v. Jesus Mesa Jr.* (9 December 2016) before the United States Court of Appeals for the Fifth Circuit.

[27] See complaint submitted by family members in support of the petitioner in the case of *Anastasio Hernandez-Rojas v. United States* (March 2016) before the Inter-American Commission on Human Rights, March 2016.

[28] Juzgado de Primera Instancia e Instrucción nº 6 (Ceuta), No. 0000123 /2014, 15 October 2016.

without water or food, or interdiction of disembarkation.[29] This may also include the use of "lateral repatriation" of Mexican males by United States agents to a different part of the border from which they crossed, possibly to areas controlled by criminal gangs where they have no contacts.[30] This includes the 2013 policy of the Government of Australia of intercepting boats to direct them back to the country from where the vessel departed (see A/HRC/35/25/Add.3). Such practices raise serious concerns: they may intentionally put lives at risk, given that security officials know, but disregard, the reality that returnees may be victims of brutal crimes when returned under these circumstances.[31] This may amount to excessive use of force by proxy; it is disproportionate and unnecessary.

34. Deterrence may also be enforced through the "weaponization" of the terrain or the environment to deter people on the move. Examples include the alleged practice of "chase and scatter", or leaving people in a hostile environment without supplies.[32] Such practices may also amount to excessive use of force.[33]

35. States can effectively control their borders in a rights-based and protection-sensitive manner.[34] This includes abiding by the principle of non-refoulement and international norms on the use of lethal force as well as the rights to life and bodily integrity in the implementation of border policies.

D. States aiding and assisting extraterritorial killings and deprivation of life

36. To avoid mass migration across their borders, some States are relying on the policy of extraterritoriality to stop migrants before they reach their territory or come within their jurisdiction or control.[35] Such policies may include assisting, funding or training agencies in other countries to arrest, detain, process, rescue or disembark and return refugees or migrants. These policies raise serious concerns when the recipient agencies or States are alleged to be responsible for serious human rights violations, including violations of the right to life.

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[29] See joint urgent appeal communication (UA IDN 5/2015) dated 21 May 2015, from special rapporteurs of the Human Rights Council/OHCHR. In response, a task force to harmonize regional responses in accordance with international maritime and protection obligations has been set up. In December 2016, Indonesia issued a presidential regulation, which provides for the rescue and disembarkation of refugees in danger, and their detention.

[30] Jeremy Slack and others, "The Geography of Border Militarization: Violence, Death and Health in Mexico and the United States", *Journal of Latin American Geography*, vol. 15, No. 1 (March 2016); Hannah Hafter and others, "Shakedown: how deportation robs immigrants of their money and belongings" (No More Deaths, 2014).

[31] Inter-American Commission on Human Rights, *Human Rights of Migrants and Other Persons*, paras. 129-132.

[32] Abuse Documentation Working Group, "Part I: Apprehension methods: the consequences of chase and scatter in the wilderness", in *Disappeared: How the US Border Enforcement Agencies are Fueling a Missing Persons Crisis* (Tucson, Arizona, La Coalicion de Derechos Humanos and No More Deaths, 2016).

[33] For an opposite view, see the position of the State and the concurring opinion of President Clare K. Roberts in the petition submitted in the case of *Victor Nicolas Sanchez and Others. (Operation Gatekeeper) v. United States*, report No. 104/05, petition 65/99 (27 October 2005). For an opposite view, see Inter-American Commission on Human Rights.

[34] For instance OHCHR, "Recommended principles and guidelines on human rights at international borders" (Geneva, 2014).

[35] See press statement following discussions on the Central Mediterranean during the informal meeting of justice and home affairs ministers, 6 July 2017, Tallin, Estonia (www.consilium.europa.eu/en/press/press-releases/2017/07/pdf/estonian-presidency-press-statement-on-central-med/).

37. By financing and training the very agencies that commit these abuses, funding States are potentially aiding and assisting loss of life.[36] Article 15 of the draft articles on the responsibility of States for internationally wrongful acts of the International Law Commission sets forth the appropriate standards:

> "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."[37]

38. Courts have indicated that this provision expresses customary international law.[38] In accordance with article 16 of the draft articles on responsibility of States for internationally wrongful acts, the aid or assistance does not need to be "essential" to the performance of the unlawful acts, but it must "contribute [...] significantly to that act'.[39] Moreover, the State providing aid must have done so with the "knowledge of the circumstances of the internationally wrongful act.[40]

39. All assistance in the context of entry control must be viewed in this light. While States may seek to portray their programmes as humanitarian, they must also examine whether they are in fact aiding and assisting in the arbitrary deprivation of life. Funding initiatives to transit countries where human rights violations are endemic must be aimed at enhancing protection and must not aid or contribute to known violations in the name of migration or border control.[41]

40. In some situations, disregard for the human rights of migrants may trigger concerns under articles 40 and 41 of the draft articles on responsibility of States for internationally wrongful acts: there is a "gross and systematic failure" by the responsible State to fulfil its obligation to protect life, and as a result, States must "cooperate to bring an end through lawful means" to this breach. In the face of gross, systemic failure of human rights, other States must not "render aid or assistance in maintaining that situation".[42] Given the situation in some of these transit States and countries of origin, where migrants or refugee are subject to systemic abuse, it seems appropriate to call for destination States to stop providing funding and equipment for migration control.

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[36] Thomas Gammeltoft-Hansen and James C. Hathaway, "Non-refoulement in a world of cooperative deterrence", *Columbia Journal of Transnational Law*, vol. 53, No. 2 (2015) (providing a complete analysis of aiding and assisting as a basis for responsibility).

[37] International Law Commission, draft articles on responsibility of States for internationally wrongful acts; see resolution 56/83, annex, and A/56/10, chap. IV, sect. E.

[38] Thomas Gammeltoft-Hansen and James C. Hathaway, "Non-Refoulement in a World of Cooperative Deterrence", University of Michigan Law School, Law and Economics Working Papers, vol. 8, No. 1, 2014, and cases cited therein.

[39] Resolution 56/83, annex, article 16.

[40] For example, there are repeated official reports of massive human rights violations committed in Libya, including by the Libyan Coast Guard and the Department for Combating Illegal Migration.

[41] See, for example, European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, para. 131; see also Gammeltoft-Hansen and Hathaway, "Non-refoulement in a world of cooperative deterrence".

[42] Resolution 56/83, annex, articles 40 and 41; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, para. 118.

E. Killings by non-State actors, including smugglers and traffickers

41. Death at the hands of criminal networks and armed groups is one of the greatest risks to migrants. As reported by the Inter-American Commission on Human Rights, the "fragile institutional infrastructure, corruption by public officials, and the impunity that attends crimes committed against migrants in an irregular situation have nurtured the growth of criminal activity and human rights violations" committed against them.[43] This impunity for horrific violations of the right to life exists throughout the world.[44]

42. The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Convention) of December 2000 defines the smuggling of migrants as the unauthorized movement of individuals across national borders for the financial or other material benefit of the smuggler. The purpose of trafficking is the exploitation of the migrants, during and past the point of migration. It can occur solely within a State's borders and requires exploitation of the individual.[45] While consent is immaterial in the case of trafficking, smuggling assumes voluntary participation by the migrant, even though the migrant is not liable for criminal prosecution.[46]

43. Smuggling and trafficking lie at the core of the mass movement of people.[47] Operations vary widely in size, from small, local efforts to transnational criminal networks. Smugglers, like traffickers, may coerce and kill. This is acknowledged in the Protocol to the Palermo Convention, which establishes that circumstances that "endanger, or are likely to endanger, the lives or safety of the migrants concerned; or that entail inhuman or degrading treatment, including for exploitation, of such migrants" constitute aggravating circumstances to the criminal offences connected with smuggling.

44. There are countless instances of such aggravated smuggling. For instance, from mid-2010 to 2014, Eritrean refugees fell prey to local Sudanese and Egyptian smugglers, who kidnapped, sold and subjected them to horrific torture to extort large sums of money from their relatives. A large number of the refugees did not survive their treatment.[48] In Mexico, some organized cartels involved in smuggling also abduct for ransom, and rape, torture and kill their victims.[49] Similar violations are reported in Libya, where armed militias are "industriali[zing]" smuggling,

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[43] Inter-American Commission on Human Rights, *Human Rights on Migrants and Other Persons*, para. 104; see also Washington Office in Latin America, Latin America Working Group Education Fund and Kino Border Initiative, "Situation of impunity and violence in Mexico's northern border region", March 2017.

[44] See, for example, Mirjam van Reisen, Meron Estefanos and Conny Rijken, "Human trafficking in the Sinai: refugees between life and death" (Brussels, Europe External Policy Advisors, Tilberg University, 2012).

[45] See United Nations, *Treaty Series*, vol. 2237, No. 39574.

[46] Ibid., vol. 2241, No. 39574, articles 3(a) and 5.

[47] The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), *Risk Analysis for 2017* (Warsaw, 2017); Tuesday Reitano and Others, "Integrated responses to human smuggling from the Horn of Africa to Europe" (Global Initiative against Transnational Crime, Geneva, May 2017).

[48] See, for example, Human Rights Watch, "I wanted to lie down and die".

[49] Inter-American Commission on Human Rights, *Human Rights on Migrants and Other Persons*, para. 102.

making it more "efficient and ruthless",[50] or in Thailand, Malaysia and on the high sea in the Bay of Bengal and the Andaman Sea.[51]

45. Investigating smuggling "with homicides" raises many difficulties, including the transnational nature of the crimes and establishing causal links between death and specific actions. In 2016, the Palermo prosecutor initiated 38 procedures for smuggling involving 150 known individuals and 157 procedures where the identity of the smuggler(s) could not be ascertained. Only two included the additional charge of homicide.[52] United States border guards face similar difficulties in investigating cases of "aggravated smuggling".[53]

46. In the case of a number of people arrested in Sicily in 2016 and 2017 on the charge of smuggling migrants at sea, many were migrants themselves, who had either been forced at gunpoint by coastal smugglers to steer the boats they were being smuggled in, or had agreed to do so in exchange for free passage.[54] Even in cases where deaths occur, those actually steering the boat may not be responsible. For instance, in September 2016, a court dismissed murder charges against two migrants who steered a rubber dinghy from Libya to Italy (the boat deflated and 12 persons died) because the two men "had no other choice but to commit the crimes of which they are accused, in order to save their own lives from a situation beyond their control".[55]

47. Investigation and prosecution tend to be most successful in cases where the authorities can establish jurisdiction over the unlawful deaths and the killer remains in the territory of the prosecuting State,[56] or where there is strong cooperation between concerned countries.[57] Such cooperation is not always easy or forthcoming owing to the difficulties presented by administrative and legal red tape, lack of witnesses and corruption and collusion between officials and smugglers, including those involved in homicide.

48. On the other hand, international standards are clear and applicable to transborder unlawful death:[58] a State's responsibility to conduct an effective investigation extends beyond its borders, including by cooperating and securing relevant evidence from other States, or by providing it. There are international and regional mechanisms and bodies that support and strengthen international cooperation for a range of transnational crimes, including smuggling and trafficking.[59] "Aggravated smuggling" ought to be prioritized and the object of dedicated resources and renewed commitments on the part of intergovernmental bodies and Member States, including towards effective cooperation.

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[50] Mark Micallef, "The Human Conveyor Belt: trends in human trafficking and smuggling in post-revolution Libya", The Global Initiative Against Transnational Organized Crime, March 2017.

[51] Brian and Laczko, *Fatal Journeys*.

[52] Interviews, Palermo, May 2016.

[53] Ibid.

[54] Ibid.

[55] https://www.thelocal.it/20160908/palermo-judge-acquits-involuntary-migrant-smugglers.

[56] In 2016, a Tunisian migrant-smuggler was sentenced to 18 years in jail for the manslaughter of about 700 people who were killed in April 2015 after a collision between his overcrowded fishing boat and a Portuguese merchant ship that was attempting a rescue of the passengers.

[57] For instance, the Hungarian police has charged eight suspects for the deaths of 71 migrants and refugees found suffocated in a truck in Austria in 2015.

[58] See, for example, Inter-American Court of Human Rights, *La Cantuta v. Peru*, Judgment of 29 November 2006, para. 160; European Court of Human Rights, *Rantsev v. Cyprus and Russia*, application No. 25965/04, Judgment of 7 January 2010, para. 245.

[59] Primary among them is the United Nations on Drugs and Crime. See for instance its Model Law against the smuggling of migrants, 2010; its various training modules and expert meetings on smuggling investigations; and provision of technical assistance to States.

49. Along with the prioritization of "aggravated smuggling", a developmental approach to smuggling may also have an impact on unlawful death. Experts point to the example of the town of Zuwarah in Libya, once one of the main departure points for Italy. Three shipwrecks, with bodies washing ashore, ignited local opposition to smuggling, reinforced by the intense negative focus on the town from the international community.[60] Locals continue to prohibit smuggling to this day, suggesting alternative models of engagement with transit countries.

F. Investigations of arbitrary deprivations of life

50. The unlawful deaths of refugees and migrants involving State responsibility or non-State actors too rarely trigger a thorough investigation. Instead deaths seem to be tolerated as an assumed risk of irregular travel. This report has highlighted examples of investigations and prosecutions in Italy, Spain, Thailand and the United States, some of which have resulted in convictions, particularly when the killings and the smuggling were linked to trafficking.[61] However, in view of the number of unlawful deaths reported on a yearly basis (admittedly far below the reality), these investigations and convictions barely scratch the surface of the tragedy.

51. The consequences of non-investigation are extremely serious, including violation of the right to life, impunity and the absence of reparations and closure for the families. Non-investigation also contributes to continuing policies and practices that may amount to excessive use of force or to lack of due diligence in addressing preventable and foreseeable deaths. Failure to investigate such unlawful casualties also restricts the understanding of smuggling and migratory patterns.

52. The duty to investigate is central to upholding the right to life.[62] When applied to the unlawful deaths in the context of mass movements of people, including through smuggling or trafficking, some international standards are particularly important:[63]

(a) The duty is heightened in situations involving State actors, including allegations of excessive use of force;

(b) It extends to deaths that occur at the hands of non-State actors, encompassing persons unknown[64] as well as to unlawful deaths resulting from unsafe conditions, self-inflicted harm or risky activity;[65]

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[60] Mark Micallef, "The Human Conveyor Belt: trends in human trafficking and smuggling in post-revolution Libya", pp. 11 and 12 (Geneva, Global Initiative against Transnational Organized Crime, 2017).

[61] For examples of data on trafficking convictions, see United States, Department of State, "Trafficking in persons report" (June 2017).

[62] See, for example, European Court of Human Rights, Grand Chamber, *McCann and Others v. The United Kingdom*, para. 161; Inter-American Court of Human Rights, *Montero-Aranguren and Others. (Detention Center of Catia) v. Venezuela*, para. 66; African Commission on Human and Peoples' Rights, general comment No. 3, paras. 2 and 15; Human Rights Committee, general comment No. 31, paras. 15 and 18; *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)* (United Nations publication, Sales No. E.17.XIV.3).

[63] For a thorough analysis of the European jurisprudence, see, T. Spijkerboer, "Moving migrants, States and rights: human rights and border deaths", *Law and Ethics of Human Rights*, vol. 213, No. 2 (2013).

[64] See, for example, Human Rights Committee, general comment No. 31, para. 10; African Commission on Human and Peoples' Rights, general comment No. 3. See also European Court of Human Rights, Grand Chamber, *Hassan v. The United Kingdom*, application No. 29750/09, Judgment of 16 September 2014, para. 78.

[65] European Court of Human Rights, Grand Chamber, *Öneryıldız v. Turkey*, application No. 48939/99, Judgment of 30 November 2004, paras. 70-74; and European Court of Human Rights, Third Section, *Keenan v. The United Kingdom*, application No. 27229/95, Judgment of 3 April 2001.

(c) Investigations include identifying the dead or missing, and determining the cause of death;[66]

(d) A formal complaint is not necessary nor does a body need to be found;[67]

(e) Family members of deceased refugees and migrants have the right to take part in an investigation into an unlawful death, and to obtain available information on the causes of death: they also have the right to equal and effective access to justice; to adequate, effective and prompt reparation (E/CN.4/1998/43, paras. 68-75 and A/HRC/22/45); and to recognition of their status before the law (A/HRC/19/58/Rev.1, chap. II, sect. H, para. 42).[68]

53. This report suggests that some practices at borders, linked to the implementation of deterrence policies, may amount to excessive use of force. While individual deaths should be investigated on a case-by-case basis to ascertain the liability of individual officials, evidence implies that these are more than unconnected incidents. Although there have been inquests into individual deaths, the sheer number of suspicious deaths itself may highlight a series of connected breaches, hinting at official tolerance or policies that should also be the object of investigation.[69] This obligation to investigate the broader policy context may also be deduced from State's obligation to uphold the right to know the truth (see E/CN.4/5/102/Add.1, principles 2-5; E/CN.4/2004/88; and E/CN.4/2006/91).[70]

54. The principle of universal jurisdiction widens the scope of national jurisdiction to any act that is deemed to be of universal concern. These include genocide, crimes against humanity and war crimes, but may also include unlawful killings when closely related to human trafficking, torture and enforced disappearances (see A/71/111). With regard to the scope and application of universal jurisdiction on the basis of national legal rules, applicable international treaties and judicial practice,[71] the 2015 Madrid-Buenos Aires Principles of Universal Jurisdiction reinforces the understanding of the ratione materiae of universal jurisdiction as including extrajudicial executions as a crime subject to universal jurisdiction. The application of the principle of universal jurisdiction, in the context of the unlawful killings of refugees and migrants, could address some of the issues identified in the present report.

55. Crimes that "threaten the peace, security and well-being of the world"[72] may be investigated by the International Criminal Court. Should the jurisdictional requirements of the International Court be met, investigations into crimes against

[66] *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)* (United Nations publication, Sales No. E.17.XIV.3).

[67] See resolution 70/175 (United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)), rule 71(1); European Court of Human Rights, Grand Chamber, *Varnava and Others v. Turkey*, application Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment of 18 September 2009.

[68] United Nations, *Treaty Series*, vol. 2716, No. 48088 (International Convention for the Protection of All Persons from Enforced Disappearance), article 24 (6).

[69] European Court of Human Rights, *Ireland v. The United Kingdom*, application No. 5310/71, Judgment of 18 January 1978.

[70] See, for example, International Covenant on Civil and Political Rights, article 2 (resolution 2200 A (XXI), annex) and International Convention for the Protection of All Persons from Enforced Disappearance, art. 24 (resolution 61/177, annex). See also Inter-American Court of Human Rights, *Rochela Massacre v. Colombia*, Judgment of 11 May 2007, para. 195; and *Bámaca-Velásquez v. Guatemala*, Judgment of 25 November 2000, para. 197.

[71] Available from http://en.fibgar.org/proyectos/principles-of-universal-jurisdiction.

[72] United Nations, *Treaty Series*, vol. 2187, No. 38544 (Rome Statute of the International Criminal Court), third para. of the preamble.

refugees and migrants by State officials and non-State actors[73] ought to be opened. Such investigations may not only curb crimes where they are occurring, they may also prevent or undermine international support, in the name of migration control, to the States or agencies being investigated, or stop or slow further propagation of unlawful practices elsewhere.

IV. Search, identify, and trace

A. Obligation to protect: search and rescue operations

56. Under their obligation to protect, States must act with due diligence to protect individuals against actions by non-State actors that may infringe on their right to life.[74] As with all other human rights principles, the responsibility to protect and due diligence must be implemented without discrimination, including on the basis of migration status.

57. The duty to prevent "encompasses all those measures of a legal, political, administrative, and cultural nature that ensure the safeguard of human rights, and [requires] that any possible violation of these rights is considered and treated as an unlawful act, which, as such, may result in the punishment of the person who commits it, as well as the obligation to compensate the victims for the harmful consequences".[75]

58. The duty is violated whenever States fail to act with due diligence, which requires an assessment of: (a) how much the State knew or should have known; (b) the risks or likelihood of harm; and (c) the seriousness of the harm (see A/HRC/35/23). Human rights doctrine thus acknowledges that the positive obligations should not be interpreted so as to impose a disproportionate burden on States'.[76]

59. Governments around the world know that people will die attempting to cross dangerous border regions, including deserts, rivers and seas. Here, the conflict between human rights and migration control could not be clearer: migrants are supposed to be deterred from crossing a border because they might die. It is impossible to protect the right to life while simultaneously attempting to deter entry by endangering life.[77] Nor is it acceptable to discourage exit out of countries where lives are endangered on the grounds that doing so saves lives from the dangers of border crossing: that is simply permitting a more secret death elsewhere.[78] States

[73] The jurisprudence of the International Criminal Court supports the proposition that non-State actors may be liable for prosecution for carrying out crimes against humanity provided that they meet the requirements of constituting "an organization": International Criminal Court, "Situation in the Republic of Kenya", pursuant to article 15 of the Rome Statute, para. 93, cited by Open Society Foundations, *Undeniable Atrocities: Confronting Crimes against Humanity in Mexico* (New York, 2016).

[74] See Human Rights Committee, general comment No. 31 (2004); see CCPR/C/21/Rev.1/Add.13, para. 8.

[75] Inter-American Court of Human Rights, *González et al. ("Cotton Field") v. Mexico*, Judgment of 16 November 2009, para. 252.

[76] Council of Europe, *Osman v. The United Kingdom*, application No. 87/1997/871/1083, Judgment of 28 October 1998, para. 116.

[77] One example of a policy premised on deterrence is the 2012 annual report of the Houston Police Department.

[78] United States Customs and Border Protection, "CBP addresses humanitarian challenges of unaccompanied child migrants", 22 June 2017.

must take those "measures within the scope of [its] powers which, judged reasonably, might have been expected to avoid [the] risk" to life.[79]

60. There is a range of positive examples of official search and rescue operations, which undoubtedly save many lives.[80] There is also clear evidence that search and rescue operations deliver the best results in terms of saving migrants lives when they have multi-stakeholder leadership, involving non-governmental organizations alongside State agents, grounded in cooperation and mutual respect, while acknowledging differences. In general, however, far more needs to be done to include civil society in search and rescue work, as many non-governmental organizations have invaluable skills and access to the migrant community.[81]

61. Protection on the high seas raises specific challenges, as a State's human rights obligations are typically bounded by its territorial limits or its jurisdiction or control over an area or person.[82] However, even though such areas are outside the territorial jurisdiction of coastal States, the high seas impose another duty, the duty to provide an "adequate and effective" search and rescue service, as found in three Maritime Conventions.[83] Rescue must be provided "regardless of the nationality or status" of the person in distress or the "circumstances in which that person is found".[84] The intent of these treaties is to create a system to rescue all vessels in distress.

62. When deaths on the Central Mediterranean migration routes surged, Italy appropriately responded by launching "Mare Nostrum", a search and rescue operation credited with saving thousands of lives. However, without the financial and political support of the States members of the European Union, Italy abandoned the programme in October 2014. Subsequently, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) launched "Operation Triton" to support Italy with border control, surveillance and search and rescue and "Operation Sophia", whose main objective is to disrupt the business model of criminal networks. These operations have never matched the success achieved by Mare Nostrum in preventing casualties, in part because their primary mission is not search and rescue but border control.

63. Vessels operated by a number of humanitarian non-governmental organizations play a major role in rescue operations, alongside States interventions and other private vessels. The vessels operated by non-governmental organizations station themselves at the edge of Libya's territorial waters to save lives, as smugglers are now using dinghies, which easily rip or capsize. The high number of casualties among migrants in 2017 indicates, however, that these efforts are insufficient.

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[79] Council of Europe, *Osman v. the United Kingdom*, para. 116.

[80] See, for example, United States Department of Homeland Security, United States Customs and Border Protection, "Search and rescue efforts for FY 2015", 30 June 2016. This includes as well an operation launched by the Italian Government, Mare Nostrom.

[81] This includes for instance the United States Customs and Border Protection Missing Migrants Project: it cooperates with non-governmental organizations, which are able to operate water stations and medical stations in public lands, and to interface with families of missing migrants, without interference: interviews, July 2017; see also Police Executive Research Forum, *Responding to Migrant Deaths Along the Southwest Border: Lessons from the Field* (Washington, D.C., 2016).

[82] Human Rights Committee, general comment No. 31 (2004), CCPR/C/21/Rev.1/Add.13, para. 10.

[83] United Nations, *Treaty Series*, vol. 1833, No. 31363, art. 98 (United Nations Convention on the Law of the Sea); vol. 1184, No. 18961, regulation 15 (International Convention for the Safety of Life at Sea, 1974); and vol. 1405, No. 23489, annex, chap. 2.1.1 (International Convention on Maritime Search and Rescue).

[84] United Nations, *Treaty Series*, vol. 1405, No. 23489, annex, chap. 2.1.10 (International Convention on Maritime Search and Rescue).

Moreover, non-governmental organizations are under increasing pressure from the European Union, which is undermining, if not preventing, their efforts.[85]

64. The European Union and its member States have put in place an extensive surveillance system focused on security and border patrol, which now includes the North Atlantic Treaty Organization (NATO).[86] Having chosen to provide security in the Mediterranean, the States members of the European Union cannot escape their obligation to protect. They are exercising sufficient functional control to be subject to the one obligation inextricably linked to ocean surveillance: an adequate and effective system of rescue.[87] This includes the implementation of the principle of non-refoulement,[88] including to unsafe third countries, the protection of refugees and migrants, including against preventable and foreseeable loss of lives, and support to ships operated by non-governmental organizations.

B. Dignity in death

65. Large numbers of refugees and migrants die or go missing every year at both land and sea borders. For the most part, the names of the missing and dead are unknown; their families have not been traced; and where bodies have been found, they are too often buried in unnamed graves. This represents one of the great untold tragedies of this catastrophe, one that triggers the responsibility of States to provide dignity and accountability in death.[89]

1. Tracing and the collection of data on the dead and missing migrants

66. States are required to take all reasonable steps to identify the deceased[90] and to determine the cause of death. This obligation forms part of the procedural duty to investigate deaths.[91] In addition, responsibilities can also be drawn from other rights, including: the prohibition of cruel, inhuman and degrading treatment or punishment; the right to equality; the right to family life; the prohibition of discrimination; the right to property; and the right to legal personality.[92] Furthermore, the treatment of the dead and the concept of dignity in death has a long and developed history in international humanitarian law.

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[85] See, example, the "Code of conduct for NGOs involved in migrants' rescue operations at sea", proposed by the Italian Government and the European Union in July 2017.

[86] Jens Stoltenberg, Secretary-General of NATO, press conference, 13 March 2017.

[87] It has been argued that functional jurisdiction could be extended to coastal States that receive a distress call from outside their search and rescue region: see Efthymios Papastavridis, "Rescuing migrants at sea and the law of international responsibility", *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control*; Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen, eds. (New York, Routledge, 2017). This functional jurisdiction should be co-extensive with the authority member States of the European Union and NATO have assumed over the entire region and should extend to providing an adequate system of search and rescue.

[88] The principle of non-refoulement applies at the European Union external borders as well to Frontex: see European Union Agency for Fundamental Rights, *Scope of the Principle of Non-Refoulement in Contemporary Border Management: Evolving Areas of Law* (Luxembourg, Publications Office of the European Union, 2016).

[89] Last Rights project, "The dead, the missing and the bereaved at Europe's international borders: proposal for a statement of the international legal obligations of States", May 2017.

[90] International Committee of the Red Cross, United Nations Guiding Principles on Business and Human Rights, Commentary on Article 3 (2009).

[91] European Court of Human Rights, *Cyprus v. Turkey*, application No. 25781/94, Judgment of 10 May 2001; *McCann and Others v. The United Kingdom; Mahmut Kaya v. Turkey*, application No. 22535/93, Judgment of 28 March 2000.

[92] See Last Rights project, "The dead, the missing and the bereaved at Europe's international borders".

67. Following humanitarian disasters, international norms have also been established which provide for tracing missing persons and recording the dead, and such norms have been used by those working in the field of migration responses.[93] Standard procedures should include a method for: (a) removing dead bodies; (b) preserving DNA, fingerprints and personal belongings; (c) identifying human remains, including forensic techniques; (d) notifying relatives; (e) storage of data where future identification may be necessary; and (f) respectful burial. Such a process would assist with the collection of information that could benefit our understanding of the humanitarian situation.

68. Following the Indian Ocean earthquake and tsunami in 2004, the Government of Thailand was able to identify most of the bodies. Those that remained unidentified, which were presumed to be the bodies of undocumented migrants, were tagged and catalogued with microchips so that future identification could be carried out.[94]

69. Other best practices include those of Italy's national Commission for Missing Persons and its team of forensic pathologists and anthropologists, who undertook systematic investigations into three Lampedusa shipwrecks that took place between 2013 and 2015.[95] The Pima County Office of the Medical Examiner in Arizona in the United States has treated all migrant deaths as worthy of investigation and best practices, with the support of forensic anthropologists. The non-governmental organization Operation Identification locates, identifies and repatriates remains found in Texas.

2. Family rights

70. Every year the mothers of missing migrants from El Salvador, Guatemala, Honduras and Nicaragua follow the path that their sons and daughters took to Mexico City, in search of their children or information on their whereabouts. They carry photographs of their loved ones on placards. This movement is known as the Caravana de Madres Migrantes Centroamericanas. In Tunisia, the families of more than 300 migrants who went missing on their journey to Italy in 2011 have waged a five-year campaign to trace their loved ones.[96] Six of these families were eventually given visas to travel to Italy for an exchange of digital fingerprints.[97] In Lampeduza, there is a yearly commemoration to remember the migrants who lost their lives in the 2103 shipwreck. In Italy there is an annual "Day of Remembrance for the victims of Immigration" on 3 October. These examples of communities and families seeking truth, memory and closure should be supported and emulated by other States.

71. The loss of a loved one, or the pain of not knowing what happened to them, can have an agonizing effect on a family. As noted by the Inter-American Court of Human Rights in its 2013 report, "[k]nowing the whereabouts of the disappeared migrants or locating the bodies of those who perished is of the utmost importance to

[93] Pan American Health Organization (PAHO) and World Health Organization (WHO), *Management of Dead Bodies in Disaster Situations*, Disaster Manuals and Guidelines Series No. 5 (Washington, D.C., 2004).

[94] Huma Ali and others, "Recovery and identification of the missing after disaster: case studies, ethical guidelines and policy recommendations" (2011), p. 23.

[95] Brian and Laczko, eds., *Fatal Journeys*, p. 43; and Patrick Kingsley, "Italian navy recovers ship that sank with over 800 people on board", *The Guardian*, 29 June 2016.

[96] Brian and Laczko, eds., *Fatal Journeys*, vol. 2, p. 60.

[97] Federico Oliveri, "'Where are our sons?': Tunisian families and the repoliticization of deadly migration across the Mediterranean Sea", in Lynda Mannik, ed., *Migration by Boat: Discourses of Trauma, Exclusion, and Survival* (New York, Berghahn Books, 2016).

their families, as it enables them to bury their loved ones according to their beliefs, and get closure to [their] mourning."[98]

72. Families have the right to participate in investigation, to reparation and to know the truth about the circumstances of death and location of the remains of their family member(s) (A/HRC/21/46, para. 54).[99] They also have specific rights in relation to human remains. When the identity of a deceased person has been determined, States should inform relatives immediately and deliver a notification of death in an accessible manner. Upon completion of investigation procedures, human remains and possessions of the deceased should be returned to family members.

73. These requirements are not always easy in practice. Families may require visas which may not always be made available. Additionally, foreign jurisdictions and institutions can often be difficult for family members to navigate without proper assistance.

3. Burial

74. States have several obligations with regard to the care of human remains, including the collection of bodies, the identification of the dead, investigation of the cause of the death, the return of the remains to families and the provision of an appropriate burial.[100] States are under a duty to issue a death certificate, a document of crucial legal importance to the families of the deceased.[101]

75. Where repatriation or the return of remains to family members or next of kin is impossible, States are obliged to provide a dignified and respectful burial, and to give due regard to the religious and cultural traditions of families, in cases where they are known.[102]

76. Families have a right to know the location of a relative's burial, meaning that gravesites should be marked and recorded. Families may be identified or come looking for their loved ones at a later stage, and therefore it is important that a record of burial is kept for future identification. Families also have a right to visit the grave.[103]

77. In spite of the practical and political difficulties, local and national officials attempt to provide those who have died with dignified burials and to put in place a system for future identification. Such examples include Dogancay Cemetery in Izmir, Turkey,[104] a new Muslim cemetery in Kato Tritos, Lesbos, Greece,[105] the

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[98] Inter-American Commission on Human Rights, *Human Rights on Migrants*.

[99] European Court of Human Rights, *Kelly and Others v. The United Kingdom*, application No. 30054/96, Judgment of 27 September 2001.

[100] Last Rights project, "The dead, the missing and the bereaved at Europe's international borders"; International Committee of the Red Cross (ICRC), conference to review the management and identification of dead migrants in the Mediterranean: the experience of Mediterranean countries, Milan, Italy, 30 October and 1 November 2013, and "Missing People, DNA Analysis and Identification of Human Remains" (Second edition, 2009); see also A/CN.4/L.871 (draft articles on the protection of persons in the event of disasters).

[101] Article 129 of the Fourth Geneva Convention requires that '[d]eaths of internees shall be certified in every case by a doctor, and a death certificate shall be made out, showing the causes of death and the conditions under which it occurred.'

[102] European Court of Human Rights, "Article 9: freedom of thought, conscience and religion" (2015); see also Council of Europe, "Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin", European Treaty Series, No. 186 (2002).

[103] European Court of Human Rights, *Sabanchiyeva and Others v. Russia*, application No. 38450/05, Judgment of 6 June 2013.

[104] Brian and Laczko, eds., *Fatal Journeys*, p. 59.

[105] Mediterranean Missing, "Missing migrants: management of dead bodies in Lesbos", Greece, country report (August 2016).

cemetery in Palermo, Italy, and Castellammare cemetery in Trapani province in Sicily.[106]

78. In 2008, a memorial on the island of Lampeduza was dedicated to the thousands of migrants who had died or who had gone missing at sea trying to reach Italy, and whose names and exact places of death are unknown. Built in the shape of a door facing the sea, it represents the gateway to Europe, and commemorates the women, men and children who lost their lives "in search of a better life".[107]

V. Conclusion

79. The Special Rapporteur wishes to pay tribute to those, within central and local governments and international intergovernmental organizations and international and national civil society and non-governmental organizations, as well as private citizens, who are working to protect refugees and migrants around the world, including against arbitrary deprivation of life. They do so in a global context where migration is associated with criminality, including threats to security and employment, and where their actions to uphold a legal obligation and a moral imperative — saving lives — are attacked, criticized and sometimes criminalized.

80. States are entitled to exercise jurisdiction over their borders. However, they must do so on the basis of their human rights obligations, including their obligations with regard to the right to life of refugees and migrants.

81. The absence of accurate data on the dead and missing refugees and migrants represents a "secondary crisis beyond the initial loss of life of hundreds of migrants each year".[108] The frequent absence of investigations into these deaths is an additional, worldwide violation of the right to life, contributing to an international regime of impunity, the invisibility of the violations, and of their victims, and ill-informed policymaking related to migration that may contribute to further deprivation of life.

82. International initiatives related to the global governance of the movement of refugees and migrants constitute an opportunity to address these problems and violations, and to ensure that the right to life of refugees and migrants is respected and protected, including against foreseeable and preventable loss of life.

[106] Field notes, May 2017.

[107] Ibid., see also: Leanne Weber and Sharon Pickering, *Globalization and Borders: Death at the Global Frontier* (New York, Palgrave Macmillan, 2011); and Stefanie Grant, "Recording and identifying European frontier deaths", *European Journal of Migration and Law*, vol. 13, No. 2 (2011), pp. 135-156.

[108] Robin Reineke and Daniel Martinez, "Migrant deaths in the Americas (United States and Mexico)", in *Fatal Journeys: Tracking Lives Lost during Migration*. Tara Brian and Frank Laczko, eds. (Geneva, IOM, 2014).

VI. Recommendations

Recommendations for States, intergovernmental organizations and other actors

A. Integration of protection of the right to life in international initiatives

83. **Indicators for Sustainable Development Goal target 10.7, on the facilitation of orderly, safe and responsible migration and mobility of people, should include the number of dead and missing migrants.**

84. **The 2018 global compact on safe, orderly and regular migration and the 2018 global compact on refugees should focus on the prevention of and responses to the arbitrary deprivation of life of refugees and migrants, and on the collection and sharing of accurate data regarding the dead and missing. They should also include studies on smuggling communities in order to identify possible developmental, non-criminal responses.**

85. **The principles and practical guidance of the Global Migration Group on the human rights protection of migrants in vulnerable situations and within large movements should be supported and implemented. They should include a focus on the prevention of unlawful deaths, including in transit States, en route, and at the hands of States or of non-State actors.**

B. International cooperation for dignified treatment of the dead: 2018

86. **The Global Compacts or their follow-up mechanisms should consider the establishment of an international inquiry and truth commission to uncover and reveal the extent of massive violations of people on the move, including their unlawful deaths, and recommend any follow-up actions for accountability and against impunity and for collective memory.**

87. **They should establish an international permanent multi-stakeholder mechanism for the governance and coordination of search, identification and tracing activities for missing refugees and migrants, including human rights-based protocols for search and rescue in borders areas and other terrain, such as deserts.**

88. **They should develop common methods of recording information and forensic protocols, including from a gender-sensitive standpoint, and international best practices regarding the dignified treatment of the dead to guide States and others.**[109]

C. Transnational justice cooperation

89. **International and regional bodies, such as the United Nations Office on Drugs and Crime, the International Criminal Police Organization (INTERPOL) and the European Police Office (EUROPOL), and international and bilateral initiatives should prioritize investigations into "aggravated smuggling", including through expert meetings, guidelines and technical assistance.**

[109] See, for example, Last Rights project, "The dead, the missing and the bereaved at Europe's international borders".

D. International accountability

90. The International Criminal Court should consider preliminary investigation into atrocity crimes against refugees and migrants where there are reasonable grounds that such crimes have taken place and the jurisdictional requirements of the Court have been met.

States

E. General principles

91. States should ensure that migration governance measures respect, protect and fulfil the right to life of all refugees and migrants, and that, in particular, no policies or practices rely on the likelihood, risk or severity of the harm refugees and migrants may incur to deter entry.

92. They should abide at all times with the principle of non-refoulement, including on the high seas and at borders.

93. They should implement individually based assessments at borders; under no circumstances engage in collective expulsion; and ensure that victims of trafficking, including women and girls, at risk of exploitation shall be entitled to specific protection and individualized assistance.

94. They should review and develop plans for the implementation of the OHCHR Recommended Principles and Guidelines on Human Rights at International Borders.

95. They should work with UNHCR to develop and implement asylum protection-sensitive border management systems.

96. They should adopt or amend legislation to ensure that irregular entry, the attempt to enter in an irregular manner or irregular stay is not considered a criminal offence, and ensure that administrative sanctions applied to irregular entry are proportionate and reasonable.

97. They should ensure that the use of force and use and possession of firearms and other weapons by border authorities is strictly regulated, in accordance with international human rights law, and any misuse or excess thereof is appropriately sanctioned.

F. Investigation

98. States should carry out all investigative efforts into the death or disappearance of refugees and migrants with the cooperation of all States involved, and prioritize investigations into "aggravated smuggling".

99. They should take all appropriate action to bring to justice all persons presumed responsible for the death of refugees and migrants, including through cooperation with other States.

100. They should promptly investigate mass graves of refugees and migrants, and refrain from taking any measures that could derail or delay the investigation.

101. They should investigate policies that may have contributed to unlawful death, and any failure to take reasonable measures to prevent them.

G. Access to justice and remedies

102. **States should ensure that all refugees and migrants and their families have effective access to justice, whatever their migration status: all refugees and migrants and their families should be able, and should be encouraged, to report arbitrary killings and disappearances, file charges and access witness protection, if needed.**

103. **States should ensure that refugees and migrants and their families have access to effective remedies, adequate, effective and prompt reparation for harm suffered and access to relevant information concerning the unlawful death and location of the remains.**

104. **States should ensure that families are able to report that a relative is missing, using simple and accessible procedures, whose security and confidentiality they trust, both inside and outside their countries: States should support families in searching for their missing relatives and, at a minimum, support the efforts of civil societies in providing this service.**

H. Monitoring

105. **States should monitor entry systems in place for their compliance with international human rights and refugee law, in collaboration with civil society.**

106. **States should monitor and record, at borders, points of arrival or disembarkation, all allegations of suspicious death or disappearances for investigation and trend analysis.**

I. Search and rescue

107. **States should implement search and rescue obligations under international human rights and refugee law and maritime law.**

108. **States should ensure that vessels carry out robust search-and-rescue operations, including in international waters.**

109. **States should ensure that interception measures at sea do not, de facto, deny access to international protection or lead to anyone being returned, directly or indirectly, to territories where their life or freedom would be threatened.**

110. **States should deploy preventive measures, such as rescue beacons.**

111. **States should cooperate with and facilitate the work of civil society organizations engaged in search and rescue operations.**

112. **States should monitor newly identified migratory routes — either by land or by sea, with a view to saving lives and upholding human rights in order to prevent unlawful death, to the extent possible.**

113. **States should ensure that those who offer services, such as assistance to search and rescue operations, medical support, shelter and legal advice, are explicitly protected from prosecution.**

J. Right to truth and collective memory

114. States should consider setting up a national or regional truth commission tasked with discovering and revealing the truth about the unlawful death of refugees and migrants.

K. Identification, tracing and burial of the dead

115. States should implement, inter alia, the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) and best practices regarding the treatment of the dead, such as those set out in the publication of the International Committee of the Red Cross, *Management of Dead Bodies after Disasters: A Field Manual for First Responders*, and the "Last Rights" project five-point action plan; and support and train local officials to implement these standards.

116. States should establish centralized regional databases and mechanisms to link existing national databases.

117. States should establish firewalls between criminal/enforcement data collection and data collected for identification.